SUPREME COURT, U. S.

No. 226

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In the

Supreme Court of the United States

OCTOBER TERM, 1968.

SILVER, INC., a corporation, MOORE-ADDISON CO., a corporation, B S R (USA) LIMITED, a corporation, HABER CORPORATION, a corporation, SPIC & SPAN SERVICE STATIONS, INC., PAULINE HAFFA, DORA HAFFA, MAE HAFFA and TITUS HAFFA (being Creditors), and DORA HAFFA, MAE HAFFA, PAULINE HAFFA, TITUS HAFFA, ETHEL HAFFA, EUGENE BERGERON and JACK M. LACHMANN (being Shareholders),

Petitioners,

vs.

WEBCOR, INC., WEBCOR SALES COMPANY, INTERNATIONAL FASTENER RESEARCH CORPORATION, and DYNAMICS CORPORATION OF AMERICA,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI ON BEHALF OF FRANK M. WHISTON, TRUSTEE IN BANKRUPTCY OF WEBCOR INC., AND WEBCOR SALES COMPANY, BANKRUPTS.

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STATUTES INVOLVED

11 U.S.C. 67c (Bankruptcy Act, Sec. 39c):

> A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court upon petition filed within

such ten-day period may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Unless the person aggrieved shall petition for review of such order within such ten-day period, or any extension thereof, the order of the referee shall become final. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest.

11 U.S.C. sec. 110, sub f (Bankruptcy Act, Sec. 70f):

The court shall appoint a competent and disinterested appraiser and upon cause shown may appoint additional appraisers, who shall appraise all the items of real and personal property belonging to the bankrupt estate and who shall prepare and file with the court their report thereof. Real and personal property shall, when practicable, be sold subject to the approval of the court. It shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of its appraised value. Whenever a sale of real or personal property of a bankrupt is made by or through an auctioneer employed by the court, receiver, or trustee, the auctioneer must be a duly licensed or authorized auctioneer in the place where the sale is to be conducted.

11 U.S.C. sec. 501 (Bankruptcy Act, Sec. 101):

The provisions of this chapter shall apply exclusively to proceedings under this chapter.

11 U.S.C. sec. 701 (Bankruptcy Act, Sec. 301):

The provisions of this chapter shall apply exclusively to proceedings under this chapter.

11 U.S.C. sec. 776 (Bankruptcy Act. Sec. 376):

If the statement of the executory contracts and the schedules and statement of affairs, as provided by paragraph (1) of section 324 of this Act, are not duly filed, or if an arrangement is not proposed in the manner and within the time fixed by the court, or if an arrangement is withdrawn or abandoned prior to its acceptance, or is not accepted at the meeting of creditors or within such further time as the court may fix, or if the money or other consideration required to be deposited is not deposited or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused, the court shall—

(1) where the petition was filed under section 321 of this Act, enter an order dismissing the proceeding under this chapter and directing that the bankruptcy be proceeded with pursuant to the provisions of this Act; or

(2) where the petition was filed under section 322 of this Act, enter an order, upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismissing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors: Provided, however, That an order adjudging the debtor a bankrupt may be entered without such hearing upon the debtor's consent.

OPINION BELOW

The opinion of the United States Court of Appeals for the 7th Circuit is reported in 392 F 2d 893. The opinion is also printed in full in the Appendix, Page 37, of the Petition for Certiorari, but the attention of this Court

is called to the last paragraph appearing on Page 39 thereof, which is not an exact transcription from the opinion.

QUESTIONS PRESENTED

1. Whether this Court should review by certiorari the decision by the Court of Appeals, affirming the District Court order, which affirmed the Referee's orders of October 25, 1967 and November 7, 1967, adjudicating the Debtor a bankrupt and confirming the judicial sale.

2. Did the sale, after adjudication, for a sum far beyond the Court's appraisal, by competitive bidding, approved and confirmed by the Court, vest in the purchaser full equitable title to the property sold or was there a clear abuse of discretion.

STATEMENT

This Respondent, Frank M. Whiston, as Receiver and now Trustee in Bankruptcy of Webcor Inc. and Webcor Sales Company, formerly Debtors under proceedings in Chapter XI of the Bankruptcy Act, and now Bankrupts, believes it necessary, by reason of omission, and for clarification, to set forth the facts, for a more relevant summary thereof.

The condition of the Bankrupts before the proceedings were filed on July 5, 1967, was that its factories were shut down for two months prior thereto, with defaults in payroll and rents; the accounts receivable had been pledged and the inventories were unbalanced; when the Receiver took possession, the Bankrupts, then the Debtors under the Chapter XI proceedings, were not "going concerns", having only a skeleton staff of executives and office personnel requiring a weekly payroll of $30,000.

On July 6, 1967, the Debtors made application, on their own motion, for the appointment of a Receiver, and the Court appointed Frank M. Whiston as Receiver, who qualified immediately; the Receiver spent two weeks trying to raise money which was rejected by banks; at a meeting held with Commercial Discount Corporation, who had financed Debtors' receivables, the Receiver was informed of the opinion that the Debtors would need $500,000 for working capital and would, with said capital, lose $300,000 in six months operation; then the Receiver cut the skeleton staff, referred to hereinabove, to a force of twelve people, such as bookkeepers, watchmen and the like. The Debtors having failed for almost four months after the filing of the original proceedings under Chapter XI to file a plan, and having received three extensions of time from the Court to file schedules, ultimately filed on September 1, 1967, the Referee on October 12, 1967 ordered the debtor to file a plan of arrangement on or before October 25, 1967, and a hearing was set for the same date pursuant to Section 376(2) of the Bankruptcy Act, 11 U.S.C. Sec. 776, and due and proper notice thereof was given to all creditors and parties in interest.

On October 17, 1967, on the petition of the Receiver, an order was entered by the Referee for the return of bids in open court, based upon a guaranteed upset price of $1,030,000 made by International Fastener Research Corp.; said order provided for the appointment of appraisers and for notice of return of bids to creditors and the general public.

No petition for review by the district judge was filed to any of the foregoing orders, and the time for filing such petitions in review has long since expired.

On October 25, 1967, the Referee entered an order pursuant to Section 376 (2) of the Bankruptcy Act, 11 U.S.C. Sec. 776, adjudicating the Debtors as Bankrupts. It is true that the Bankrupts' attorney requested the order of adjudication be postponed until November 6, 1967, stating that a plan of arrangement had been discussed with outside parties and if such a plan did not materialize, there would be no further delay.

The Order of Adjudication was entered, pursuant to notice, on October 25, 1967 (A. 57), from which no review from the Referee's order was taken within the ten day statutory period, nor was any petition for review filed to the order of October 17, 1967, for the return of bids in open court for the sale of the assets, nor was any review taken on the order of October 12, 1967, ordering the Debtor to file a plan of arrangement on or before October 25, 1967 and for the hearing on the adjudication or dismissal pursuant to Section 376(2) of the Bankruptcy Act.

On November 2, 1967 a plan of arrangement was filed, without leave of Court, by the terms of which, after payment of priorities, general creditors over $100.00 were to be paid 50% in full, this amount to be paid on the basis of 20% on or about April 25, 1968 and 6% at the end of each year thereafter for five years, subject to pro ration however, if the total claims should exceed $2,800,000; the deferred payments were to be non-interest bearing notes of the Debtors, guaranteed by A. F. Dormeyer Corporation, which company was to lend $750,000 to the Debtors for working capital; A. F. Dormeyer Corporation was to receive 79% of the stock of Webcor, Inc. and to give Webcor shareholders 200,000 shares of its common stock.

On November 6, 1967, at 10 A.M., before the Referee, the Bankrupt filed its motion to vacate the Order of Adjudication, and during the course of said hearing, Mr. Nachman, attorney for the Bankrupt, suggested that the motion "be taken by the Court until the bids have been taken this afternoon to see what the highest bid is made in this Court and I believe, Your Honor, that will really establish the realities here as to what should be done". Mr. Nachman stated that he could go on at length extolling the virtues of the plan and establishing the financial ability of Dormeyer, who is really the proponent of this plan and stands behind the Debtor, "but it could very well be that this could be academic" and, therefore, he recommended that the motion be taken and went on to say, "if we can't have a reorganization because the bidding is so high as to be too attractive to the creditors, Your Honor, I, in all honesty, could not criticize the creditors or their representatives if this should be their view." At said hearing, Mr. Kenneth Prince, one of the attorneys for the Creditors Committee, stated as follows: "We would like to have an opportunity to do precisely what Mr. Nachman suggests. We would like to have the sale this afternoon, and following the sale we would like to have a conference where we can bring the Committee together. We will be 90% in attendance this afternoon, and we will make a determination and let the Court know what the Committee thinks is in the best interest of the Creditors."

As to what transpired at the hearing at 2 o'clock on November 6, 1967 is well known from the record. The high bid of $1,725,000.00 was made by International Fastener Research Corporation. Counsel for the A. F. Dormeyer Corporation, the outside party proposing the plan, sought to interrupt the hearing on bids, as bidding

was being made, to speak of an amended plan, but not to enter a bid. The Court at the conclusion of the bid aforesaid declared a recess for the purpose of receiving the recommendations of the Creditors' Committee. The Committe gave audience to counsel for Dormeyer, counsel for International Fastener Research Corp., and counsel for the Receiver. Dormeyer had stated orally to the Court upon the conclusion of the bidding that it amended, orally, its plan by depositing $1,800,000.00 to implement its plan but not as a bid for assets. The proposed deposit was alleged to be in the courtroom but was not made.

After hearing from the parties representing the various interests aforesaid, the Committee stated to the high bidder at the sale that if it would increase its bid by $50,000.00 to $1,825,000.00 the Committee would recommend to the Referee that such bid be accepted. The high bidder increased its bid accordingly and, upon the Court reconvening, Mr. Harold Lansing, one of the attorneys for the Creditors' Committee addressed the Court stating that the Committee speaks for $1,500,000.00 worth of creditors, that it heard from all parties, as suggested by the Court, and that "the vote was this, Your Honor, by a majority that we do business with a bidder under the bankruptcy sale and that we reject all further dealings with the debtor under a plan. We felt that it was better for the creditors and a much simpler procedure that we sell at this bankruptcy sale and International Fastener Research Corp. is willing to increase its bid to $1,825,000.00 and we recommend to the Court that the bid be accepted". The Referee, in his order of November 7, 1967, sets forth that said bid was substantially in excess of the appraisal herein. The Court appraisal was $1,081,422.33.

The Referee entered an order confirming the sale aforesaid and also entered an order denying the Bankrupt's motion of November 6, 1967, to vacate the adjudication.

On November 16 and 17, 1967, certain merchandise creditors involving claims of approximately $30,000.00 and stockholders, filed petitions for review of the Referee's order of November 7, 1967. The Receiver and the Creditor's Committee filed answers asking that the petitions be denied and the orders affirmed. The answer of the official Creditor's Committee states that the full committee, at a meeting on November 2, 1967, considered the plan for arrangement, and had voted that no consideration whatever would be given to the plan and that the highest bid at the sale should be accepted if the debtors failed to produce at the hearing scheduled for November 6, 1967, the sum of $1,030,000.00 in cash or a bank letter of credit; said answer further states that the bid of International Fastener Corp. was completely enforceable by contempt proceedings and that proper deposit had been made on said bid.

Meanwhile, on November 15, 1967, the three creditors with merchandise claims approximating $30,000.00 had filed an involuntary petition for the reorganization of these debtors under Chapter X, which petition bears the same cause numbers, being required to do so under the rules of this Court.

At the hearing on November 20, 1967, on the petition for review before the District Judge reference was made to a new plan, which was not then on file, but was filed with the Clerk of the Court on the succeeding day. At the conclusion of the hearing on November 20, 1967, the District Judge found that the involuntary petition for reorganization under Chapter X was not filed in good faith and accordingly dismissed said proceedings. As to the balance of matters on review, the case was sent back to the Referee for consideration of the plan of arrange-

ment and the motion to reconsider the orders already affirmed by the District Judge.

The new plan for arrangement and the motion to reconsider the order of adjudication and the order of sale were filed on the morning of November 21, 1967.

The new plan contemplated payment of 50% on the dollar for general creditors immediately upon confirmation of the plan instead of over the period of five years and proposed that if the plan were not consummated and the assets were resold, the Debtor would make up the difference between the amount then received for the assets and $1,825,000.00. A deposit of $1,000,000.00 was made to guarantee the plan. Subsequently, on demand of the attorney for A. F. Dormeyer Corporation, this deposit was returned.

The Referee denied the motion to reconsider and within the succeeding hour the sale of assets was consummated by payment of the full cash purchase price to Frank M. Whiston, Trustee in Bankruptcy, and delivery by the said Trustee in Bankruptcy of a Bill of Sale, there having been no stay.

During the course of the hearing before the Referee on the morning of November 21, in open court, parties in attendance thereat were advised orally of the filing of an appeal by parties other than the Bankrupt or Debtor, from the order entered on the previous day by the District Judge, and upon conclusion of the hearing, notice was given that at 2 P.M. of the same day, November 21, the appellants would go before the District Judge to ask that the amount of a supersedeas bond be fixed. The District Judge after hearing arguments denied the supersedeas and denied an oral motion for an injunction against the execution of the order of sale.

An involuntary petition under Chapter X, filed by the same creditors who are parties hereto, was found on November 20, 1967 by the District Judge, not filed in good faith and dismissed, pursuant to order of like date; no appeal was taken from said order with relation to dismissal of the Chapter X proceeding. The index in the petition for certiorari (iii) refers to said order only as a denial of petition for review.

Webcor Inc. had been listed on the Midwest Stock Exchange but was delisted two months prior to the filing of the proceedings herein. Of the issued and outstanding Stock, 49% thereof is owned and controlled by the Haffa family, stockholders who are Petitioners herein. Webcor Inc. and Webcor Sales Company, Bankrupts were made parties respondent herein.

REASONS FOR DENYING THE WRIT

I.

There is no conflict in the decision of the Court of Appeals below with the decision of any other Court of Appeals or with the United States Supreme Court, nor is there any ground for granting certiorari.

Petitioner cites the case of *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 150, 63 S. Ct., 133, 137 (1943) Cert. den., which case Petitioner says is "not abrogated by statute" but Petitioner is in error in relation thereto. The statute involved in said case is section 39c of the Bankruptcy Act, as amended in 1960, 11 U.S.C. sec. 67c. The foregoing case cited by Petitioner was decided in 1943.

In the matter of *Acme Furnace Fitting Company, Bankrupt*, 302 F 2d 318 (7th Cir. 1962) the Court quoted the pertinent part of the foregoing section on page 320, as follows:

> "§ 67(c). A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court upon petition filed within such ten-day period may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. *Unless the person aggrieved shall petition for review of such order within such ten-day period, or any extension thereof, the order of the referee shall become final.* * * *" (Emphasis added.)
>
> The last italicized sentence shown above was added by the 1960 amendment. It makes clear that a petition for review must be filed within the prescribed ten day period or within such extended time

as the court may allow upon a petition for such extension filed within the same ten day period. 2 Collier, Bankruptcy sec. 39.01 at page 1468.[1]

[2] Appellant failed to comply with the provisions of Section 39, sub. c of the Bankruptcy Act, as amended, and is barred from challenging the orders he belatedly sought to have reviewed. There is no error in the order of the district court affirming the referee's denial of such review."

In *Hardesty* v. *Keightley,* 361 F 2d 751 (4th Cir. 1966), that Court similarly holds that the ten day period thus prescribed is not extended by filing a motion for rehearing, for reconsideration, or for vacation of the order.

Similarly, the case of *St. Regis Paper Co.* v. *Jackson* 369 F 2d 136, 137 (5th Cir. 1966) holds that the ten day period to petition for review, as aforesaid, is mandatory and jurisdictional.

Petitioners choose to invoke precedent under Chapter X and Chapter XI cases, notwithstanding the fact that the case at bar involves a company which had been adjudicated bankrupt and a sale made after said adjudication in bankruptcy, and approved and confirmed by the Court. The sale was made subsequent to a court ap-

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[1] "Section 39c was amended in 1960 to remove the uncertainty as to the finality of a referee's order. * * *

"Under this prior wording the Supreme Court of the United States had held in *Pfister* v. *Northern Illinois Finance Corp.,* 317 U.S. 144, 63 S. Ct. 133, 87 L.Ed. 146 (1942) that there was no limitation upon the discretion of the bankruptcy court to entertain a petition for review after the expiration of the 10 day period. The 1960 amendment now makes it clear that a petition for review must be filed within the prescribed ten day period or within such extended time as the court may allow upon petition for such extension, itself filed within such ten day period. * * *"

praisal which evaluated the property at $1,081,422.33. Bidding was highly competitive and the sum of $1,825,000.00 was the highest bid, approved and confirmed.

The cases cited by Petitioners involved proceedings under Chapter X and XI, none being comparable to the case at bar wherein an order of adjudication had been entered. The law, in such cases as this, is clear and is without conflict.

None of the petitions for review, other than an application to reconsider sought upon the Referee's orders, to the District Judge were brought by the Debtor, but rather by the following: A. F. Dormeyer Corporation, merchandise creditors of some $30,000.00 who had filed the Chapter X proceeding (dismissed as not being in good faith), and certain stockholders, principally members of the Haffa family who likewise claimed to be substantial creditors, which claims may be suspect by reason of their control of Webcor Inc., nor did the Bankrupt file the appeal below, other than to become intervenors.

A highly important and vital omission appears in the Petition for Certiorari, page 6, where quotation is made of 11 U.S.C. sec. 776, sec. 376 of the Bankruptcy Act. The omission consists of the following opening phrase of the statute which should precede the sentence set forth therein: "If the statement of the executory contracts and the schedules and statement of affairs, as provided by paragraph (1) of section 324 of this act, are not duly filed, *or if an arrangement is not proposed in the manner and within the time fixed by the court,* or if an arrangement is withdrawn . . ." (emphasis added). Petitioner cited the aforesaid section, as it read prior to amendment by Public Law 85-732, 85th Cong. 2d Sess., approved August

23, 1958. Obviously, this omission is of considerable importance herein, as is shown by the order of the Referee of October 25, 1967, wherein the Court adjudicated the Debtor to be a bankrupt (A 56). In said order, the Referee follows the foregoing statute in every respect.

In the propositions of law relied upon, Petitioner cites *In re*: *Pure Penn Petroleum Company,* 188 F 2d 851 (2nd Cir. 1951) which is a Chapter XI proceeding wherein the Court made comparisons as to the provisions of Chapter X and Chapter XI regarding liquidation. The Court there regarded liquidation as allowable only where assets are of a perishable nature or in imminent danger of diminution. The Court declares Chapter X proceedings may have a plan of liquidation, or, liquidation after an order of adjudication. The Court points out that in Chapter XI there is no such provision. Reference is made to the fact that section 101 of the Bankruptcy Act, 11 U.S.C. 501, states "the provisions of this chapter shall apply exclusively to proceedings under this chapter", and points out that the report of the Senate Judiciary Committee, in connection with the 1938 revision of the Bankruptcy Act, states that section 101 aforesaid "prevents the extension and application of any provisions of Chapter X to other chapters of this bill".

Further, section 301 of Chapter XI, 11 U.S.C. sec. 701, contains the provision that "the provisions of this chapter shall apply exclusively to proceedings under this chapter". In the Pure Penn Petroleum case, cited by Petitioner, it is indicated that an emergency is required to support a sale in Chapter XI. As is stated by the Court of Appeals below, that requirement is not applicable to the instant case in that the corporations here have previously been adjudicated bankrupts. In the *Pure Penn* case, the Court

says, on page 856 "as there was no stay or supersedeas bond, and as the district court had jurisdiction, if the sale was completed and confirmed before the appeal, the sale can not be undone, if the purchase was bona fide; i.e., not made indirectly for the Debtor or for some other party or parties to the Chapter XI proceeding". As must necessarily be repeated by the respondent to the petition herein, the case at bar involves a corporation that has been adjudged bankrupt, rather than any kind of a chapter proceeding. It is of some further importance to note that no review was ever taken of the Referee's order of October 17, 1967, for the return of bids for the sale of the assets.

So many differences distinguish the case at bar from the *Pure Penn* case, relied upon by Petitioner, which was pending as a Chapter XI proceeding, with the Debtor in possession. Under a modification of the plan in the *Pure Penn* case, Debtor proposed a private sale, with no appraisal, and more importantly there was no order of adjudication.

Petitioner makes much of repeated statements that the Bankrupt was a publicly held corporation. It was, in fact, a corporation virtually out of business for two months before the filing of the proceedings herein, and 49% of its stock was held by the Haffa family. An outsider sought the Debtor's reorganization whereas Chapter XI is for the Debtor to pursue, and herein, the Debtor is a party respondent to the proceedings.

In seeking to invoke the jurisdiction of this Court, Petitioner shows no precedent to establish any conflict with the case at bar, which involves a confirmed sale of the Bankrupt's property. Each of the Chapter X cases cited is not in point. The petition for Chapter X, which

had been filed herein, was dismissed for lack of good faith (A. 53).

Petitioner for the purpose of exhibiting conflict, calls the Court's attention to *S.E.C.* v. *American Trailer Rental Co.,* 379 U.S. 594, 85 S.Ct. 1044 (1940), wherein the Court on page 613 says it does not disagree with the holding of the *U. S. Realty* case, 310 U.S. 434, 60 S.Ct. 1044 (1940), which involved very substantial public debt, that there is no absolute rule requiring Chapter X to be utilized in every case in which the Debtor is publicly owned, and that as a general rule Chapter X is the appropriate proceeding for adjustment of publicly held debt. In the case at bar there is no publicly held debt. And the necessity for a finding of good faith is required. Again, the Debtor in the case at bar had been adjudicated a bankrupt; also, the erstwhile proceeding under Chapter X has been dismissed because of lack of good faith.

Petitioner cites *National Surety Company* v. *Coriell,* 289 U.S. 426 (1933), an equity proceeding, where the Court stated it was improper for the district court in a receivership to pass upon the wisdom and fairness of a plan of reorganization, in the equity proceeding and the rights of non-assenting creditors without definite information including an appraisal, and this case ultimately wound up in bankruptcy. There is no application of this equity receivership to the case at bar, wherein the Debtor had been adjudicated for failure to file a plan, and a judicial sale was completely consummated.

Again, a further case cited, not applicable herein, is *In re: Solar Mfg. Co.,* 176 F 2d 493 (3rd Cir. 1949), involving particular sections regarding liquidation under a plan, but again the case at bar involves a company which was adjudicated a bankrupt. *Arguendo,* if it were

assumed that Chapter X was applicable, it might well have been considered an emergency after carrying along a closed business for four months, and the continuing lethargy of the Debtor, with a continuing expense of $35,000 per month. The foregoing citation again involves a Chapter X proceeding, which type of proceeding was dismissed herein for lack of good faith and not appealed.

The argument and the cases relied upon by the Petitioner are completely distinguishable from the instant case and the amended statutes, where omissions had been made by Petitioner, set forth hereinabove, provide no basis for granting the request for certiorari on any of the grounds stated.

II.

The law on the subject of the approval and confirmation of the sale of assets, after adjudication in bankruptcy, made by competitive bidding in open court, resulting in a sum of approximately 67% more than court appraisal, grants a full equitable title to the purchaser, is well settled and therefore there is no basis for granting the request for certiorari on the grounds stated.

Petitioner, again pursues the subject of conflict of precedent by continuing the repetition of cases under Chapter X and Chapter XI, which do not obtain in the instant case. The law is indeed well settled as set forth in the opinion of the Court of Appeals, below.

The rule is very well settled that a sale may be reversed only upon a clear abuse of discretion. This rule is set forth in Collier on Bankruptcy, 1967, Vol. 4A, sec. 70.98, pp. 1183-1186.

> "The setting aside of a sale is different from both the denial of confirmation and the reversal on review

of or appeal from an order of confirmation. It presupposes an otherwise complete sale—that is, normally, a sale that requires confirmation and has been duly and definitely confirmed. Its function is one of strictly equitable jurisdiction, namely to avoid a sale, public or private, that is tinged with fraud, error or similar defects which would in equity affect the validity of any private transaction. Naturally, such defects would equally justify the denial of confirmation. But proceedings to 'set aside' a sale offer an opportunity to attack on the grounds mention a sale already finally confirmed unless the particular defect alleged was examined in the confirmation proceedings and was held to be without merit, in which case the principle of res judicata would apply. Proceedings to set aside are not a second edition of the confirmation proceedings. They cannot be set in motion for reasons other than defects of such gravity as to 'shock the conscience of the chancellor', and even irregularities of a quite serious kind that might have been, but were not, asserted in the confirmation proceedings are definitely lost and cannot be used as a ground for the request to set aside."

Where one's bid has been accepted, he has a vested interest which under the decisions may be destroyed only for the most cogent of reasons, such as fraud, or conduct which in effect amounts to fraud. But as has been said many times, the mere fact that someone comes forward and offers to bid more will not be tolerated because it is an invasion of a right acquired by the successful bidder at a free and open sale, and for the further and even more weighty reason that permitting this to be done would undermine confidence in judicial sales and thus defeat the end sought to be obtained, the protection of assets being thus liquidated. *J. J. Sugarman* v. *Davis*, 203 F 2d 931, (10th Cir. 1953).

The court below found that the proponents of the plan were, in fact, "competing bidders", both at the time of the sale and thereafter; and that the Bankrupt's amended plan filed on November 21, 1967 was merely a higher "bid", consideration of which was properly rejected by the Referee. And the court below found properly that the Referee acted well within his discretion in denying the application for reconsideration, and that the District Court did not err on November 20 and 21 in approving the actions of the Referee.

A leading decision was made *In re*: *Marathon Foundry and Machine Company,* 228 F 2d 594 (7th Cir. 1955), Cert. Den. 350 U.S. 1014 (1957). The court would not substitute its own discretion for the District Court, stating that it should reverse the order appealed from only if satisfied that the court in entering it was guilty of abuse of discretion. The facts involved the sale of stock of Bethlehem Foundry & Machine Co. at an amount in excess of a court appraisal in an instance where the objecting debtor had obtained a commitment for a loan with the Bethlehem stock as collateral; neither debtor, or its sole stockholder, bid at the sale. A further decision, on a second challenge, was rendered *In re*: *Marathon Foundry and Machine Company,* 239 F 2d 122 (7th Cir. 1956), Cert. Den. 353 U.S. 912 (1957). The court held that after a sale had been confirmed, the court and the successful bidder are regarded as occupying the relation of vendor and purchaser in an executed sale, and nothing is sufficient to avoid it which would not set aside a sale of like character between private parties.

In the case of *Lionel Millard Smith, Bankrupt,* v. *Edward N. Juhan, Trustee,* 311 F 2d 670 (10th Cir. 1962), the court in upholding the sale in a straight bankruptcy case, neither a Chapter X nor Chapter XI proceeding, which held a judicial sale regularly made with notice and in

the manner prescribed by law, stating that confirmation would not be denied or set aside unless the price is so grossly inadequate as to shock the conscience of the court, and quotes from, among others, the decision in *Laurel Oil and Gas Co.* v. *Morrison,* 212 U.S. 291, 29 S.Ct. 394, the statement of this court "the rule is settled, and it seems to be universally approved, that after confirmation of a judicial sale neither inadequacy of price, nor offers of better prices, nor anything but fraud, accident, mistake, or some other cause for which equity would avoid a like sale between private parties, will warrant a court in avoiding the confirmation of the sale or in opening the latter and receiving subsequent bids." The court cites in its decision *J. J. Sugarman Co.* v. *Davis,* supra, and *In re: Marathon Foundry and Machine Company,* 239 F 2d 122, Cert. den. 353 U.S. 912 (1957) and *Breeding Motor Freight Lines, Inc.* v. *Reconstruction Finance Corporation, et al.,* 172 F 2d 416, 424, (10th Cir. 1949) Cert. den. 338 U.S. 814, 70 S.Ct. 54.

In re: Stanley Engineering Corporation, 164 F 2d, 316, 319, 320 (3rd Cir. 1947) cert. den. sub. nom. *Root* v. *Galman,* 332 U.S. 847 (1948) the Court refers on page 318 to Section 70f of the Bankruptcy Act, 11 U.S.C. sec. 110, sub ,f: "* * * Real and personal property shall, when practicable, be sold subject to the approval of the court. It shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of its appraisal value. * * *" And on page 319, the Court says, "Where the bankruptcy court fails to confirm a judicial sale in the absence of unfairness, fraud or mistake or gross inadequacy of price, its action will be reversed on the ground of abuse of its legal discretion." And again says "To induce bidding at such sales and reliance upon them, the purpose of the law is that they shall be final."

And in *Pewabic Mining Co.* v. *Mason*, 145 U.S. 349, 1892, page 356, 12 S.Ct. 887, page 888, L Ed. 732, this Court said: "Yet the purpose of the law is that the sale shall be final; and to insure reliance upon such sales, and induce biddings, it is essential that no sale be set aside for trifling reasons, or on account of matter which ought to have been attended to by the complaining party prior thereto. * * *"

It is respectfully submitted that there is no conflict in the well established precedent on the question herein and no basis for granting the request for certiorari.

CONCLUSION

For reasons stated, it is respectfully submitted that the Petition for Writ of Certiorari be denied.

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